83-282

No.

OCTOBER TERM, 1983

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD F. WILSON and JEAN WILSON,

Petitioners,

vs.

JOHN R. BLOCK, Secretary of Agriculture; R. MAX PETERSON, Chief Forester of the United States and Acting Assistant Secretary of Agriculture for National Resources and Environment, Department of Agriculture; and NORTHLAND RECREATIONS, INC., an Arizona Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED*

1. May the Secretary of Agriculture circumvent Congress' 80-acre limitation on permits for recreational use of national forest land (16 U.S.C. §497) by issuing to private, recreational developers both a long-term permit for 80-acres or less and, under the 1897 Organic Act (16 U.S.C. §551), a supplementary permit exceeding 80-acres for recreational facilities which are essential to the use authorized by the 80-acre permit, coextensive in duration with such a use and in fact irrevocable as long as the use under the 80-acre permit continues to exist?

2. Does a mountain located within national forest land which the State Historic Preservation Officer finds as a fact under the applicable legal criteria to be of significant importance to both Indian and non-Indian patterns of American history and culture qualify as a "site" or "district" which is eligible for protection and listing under the National Historic Preservation Act, 16 U.S.C. §470, *et seq.*, and its implementing regulations, 36 C.F.R. §800.4(a)(3)?

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*All parties to the instant case are listed in the caption of the Petition. Pursuant to Supreme Court Rule 21.1(b) we list here all parties to the proceeding below in the other cases which the instant matter was consolidated.

In *Hopi Indian Tribe v. Block*, Nos. 81-1912 and 82-1706 the Plaintiff/Appellant was the Hopi Indian Tribe. The Defendants/Appellees were John R. Block, Secretary of Agriculture; Ned D. Boyley, Acting Assistant Secretary of Agriculture for Natural Resources and Environment; R. Max Peterson, Chief Forester of the United States. Northland Recreations, Inc. was an Intervenor/Appellee.

In *Navajo Medicinemen's Association v. Block*, Nos. 81-1956 and 82-1705 the Plaintiffs/Appellants were the Navajo Medicinemen's Association, Faye B. Tso; Ashee Begay, Sr.; Tom Watson, Sr.,; Miller Nez; Frank Bluehorse; Fred Stevens, Jr.; Francis D. Tsosie; Jim Charley; Hoskie Tom Becenti; Tony Trujillo; Jacob Poleviyaoma, Sr.; Jacob Poleviyaoma, Jr.; Jerry R. Sekayumptewa; and Lavern Siwumptewa. The Defendants/Appellees were John R. Block, Secretary of Agriculture; R. Max Peterson, Chief Forester of the United States; the United States Forest Service, Department of Agriculture; and the United States of America. Northland Recreations, Inc. was an Intervenor/Appelle.

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Petitioners, Richard F. Wilson and Jean Wilson, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 20, 1983.

OPINIONS IN THE COURTS AND AGENCIES BELOW

The opinion of the Court of Appeals (App. "A", pp. 1-50) is reported at 708 F.2d. 735-760. The June 15, 1981 (App. "B", pp. 51-90) and May 14, 1982 (App. "C", pp. 91-99) memorandum opinions of the District Court have not been officially reported, although portions of the June 15, 1981 memorandum opinion have been reprinted in the *Indian Law Reporter*, Vol. 14, pp. 3073-3079.

The initial decisions of the Forst Supervisor (App. "D", pp. 100-109), the Regional Forester (App. "E", pp. 110-128), and the Chief of the Forest Service (App. "F", pp. 129-141) are neither officially nor unofficially reported. The same is true of the opinions of the Forest Supervisor (App. "G", pp. 142-157), the Arizona State Historic Preservation Officer (App. "H", pp. 158-164), and the Chief of the Forest Service (App. "I", pp. 165-166) issued in connection with remand proceedings ordered by the District Court for compliance with the National Historic Preservation Act.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1983 (App. "J", p. 167). Petitioners did not file a Petition for Rehearing and Suggestion for Rehearing *En Banc*, although such petitions were filed by the Hopi Indian Tribe and the Navajo Medicinemen's Association in actions consolidated with Petitioners', the same having been denied on July 14, 1983 and July 26, 1983, respectively (App. "J", pp. 168-171).

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 4, Section 3 Clause 2, of the United States Constitution:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. 16 U.S.C. § 497:

> The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in

connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests.

3. 16 U.S.C. §551:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of Title 18.

4. 16 U.S.C. §470a(a) (1) (A)

(a) (1) (A) The Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.

5. 16 U.S.C. §470f

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted

undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470 i to 470t of this title a reasonable opportunity to comment with regard to such undertaking.

6. 16 U.S.C. § 470h-2 (a) (1) (2):

(a) (1) The heads of all Federal agenices shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 470a(f) of this title, any preservation, as may be necessary to carry out this section.

(2) With the advice of the Secretary and in cooperation with the State historic preservation officer for the State involved, each Federal agency shall establish a program to locate, inventory, and nominate to the Secretary all properties under the agency's ownership or control by the agency, that appear to qualify for inclusion on the National Register in accordance with the regulations promulgated under section 470a (a) (2) (A) of this title. Each Federal agency shall exercise caution to assure that any such property that might qualify for inclusion is not inadvertently transferred, sold, demolished, substantially altered, or allow to deteriorate significantly.

STATEMENT OF THE CASE AND THE MATERIAL FACTS

The San Francisco Peaks, a volcanic mountain mass located north of Flagstaff, Arizona, are within the Coconino National Forest and, except for certain privately owned parcels of land, are managed by the United States Forest Service, Department of Agriculture. The Arizona Snow Bowl, recently renamed the Fairfield Snow Bowl, is a 777-acre skiing facility located on the western slopes of the San Francisco Peaks on lands which are wholly within the Coconino National Forest. (App. "A" pp. 4-6.)

On April 15, 1977 the Forest Service issued two permits to Northland Recreations, Inc. to operate the Snow Bowl. One of these permits was a "Term Permit" given under the authority of the Act of March 4, 1915, 16 U.S.C. § 497, while the other was styled as a "Special Use Permit" and was issued under the purported authority of the Act of June 4, 1897, 16 U.S.C. § 551. (App. "A", pp. 41-42.)

The "Term Permit" for the Snow Bowl, as modified on May 18, 1982, covers 24 acres of land for the purposes of constructing, maintaining and operating a winter sports area consisting of uphill lifts, tows, a lodge and parking areas together with related utilities. This permit remains in full force and effect for a period ending May 1, 1997, is "not transferable," and can only be terminated upon breach of a condition of the permit. (App. "A", pp. 41-42; Record, J.A., III, 997-1024).

The "Special Use Permit," as modified on May 18, 1982, covers 753 acres of national forest land excluded from the "Term Use Permit" for the purposes of "[c]leaning, grooming, signing and maintaining ski slopes and trails in connection with the Term Use Permit for the Winter Sports Site designated Northland Recreations, Inc., dated 4-15-77." The "Special Use Permit" provides that it is "not transferrable" and "may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest

Service." Under its "Miscellaneous" provisions the Special Use Permit specifies that all revenue or sales derived from or attributable to use of the land covered by it, together with all fees, "are to be paid and determined as set forth in the Term Special Use Permit dated 4-15-77" and that the Special Use Permit "is subject to Clauses B-1 through G-12, including insurance requirement[s], in the Northland Recreations, Inc. Term Special Use Permit dated 4-15-77." The Special Use Permit's "Miscellaneous" provisions further state that "[u]nless sooner terminated or revoked by the Regional Forester, in accordance with the provisions of the permit, this permit shall expire and become void on 5-1-97, but a new permit to occupy and use the same National Forest lands may be granted provided the permittee will comply with the then existing laws and regulations governing the occupancy and use of National Forest lands and shall have notified the Forest Supervisor not less than six (6) months prior to said date that such new permit is desired." (Record, J.A., III, 993-996.)

In July, 1977, Northland Recreations submitted to the Forest Service a "master plan" for future development of the Snow Bowl which contemplated the construction of additional parking areas, ski slopes, a new lodge, and additional ski lifts. After public consultation and the consideration of six alternatives, ranging from complete removal of the Snow Bowl facility to full development as proposed by Northland, the Coconino National Forest Supervisor decided on February 27, 1979 to permit substantial expansion of skiing and recreational facilities at the Snow Bowl. (App. "D", pp 101-108.)

In its essential features, the "Preferred Alternative" approved the clearing and construction of 50 acres of new ski runs, raising the total acreage from 156 acres to 206 acres for ski runs. It authorized the construction of a new ski lodge adjacent to the existing one, increased the acreage for the parking area to 8.1 acres, permitted the widening and paving of the Snow Bowl access road, and allowed the construction of three

new ski lifts in addition to the existing one. Implementation of the "Preferred Alternative" would increase the lift capacity of the Snow Bowl five-fold (from 522 skiers to over 2,800 skiers daily), would almost double the size of the parking lots, would increase the seating capacity in the lodge from 120 people to nearly a thousand, and would increase the acreage devoted to ski runs by approximately forty percent (40%). (App. "D", pp.106-108.)

Petitioners Richard F. Wilson and Jean Wilson opposed any expansion and development of the Snow Bowl and Snow Bowl Road. The Wilsons are the fee owners of substantial tracts of land located on the western slopes of the San Francisco Peaks adjacent to the Arizona Snow Bowl permit area, including the Fern Mountain Ranch, a National Register Historic Site. Having preserved their own private land-holdings on the Peaks in a natural state, the Wilsons opposed expansion and development of the Snow Bowl and Snow Bowl Road because it would detrimentally affect the use to which they have dedicated their own property and would irreparably and adversely affect the environmental, aesthetic, historical and religious significance of the San Francisco Peaks as a whole and their own property located on it, thereby eroding the primary value which the Wilsons attach to their own lands and to the Peaks as a whole. (App. "A", pp. 51, 80-81; Record, J.A., I, pp. 88-89, IV, pp. 1351-1357.)

Accordingly, after exhausting their administrative remedies, the Wilsons filed their Complaint on March 9, 1981 in the United States District Court for the District of Columbia challenging under a variety of federal environmental laws Respondents' decision to expand and develop the Snow Bowl and Snow Bowl Road. Among other claims, the Wilsons alleged that expansion, development and operation of the Snow Bowl under the dual permit system there employed violated the 80-acre, recreational use limitation imposed by 16 U.S.C. §497, and that Respondents' failure to consult with and to refer to the Interior Secretary the question of the eligibility of the

San Francisco Peaks as an entity for listing on the National Register of Historic Places violated the National Historic Preservation Act, 16 U.S.C. §470a and §470f, together with the Interior Secretary's regulations promulgated thereunder. Jurisdiction in the District Court as to both of these claims was predicated upon 28 U.S.C. §1331. The Wilsons sought a declaratory judgment under 28 U.S.C. §2001, *et seq.* and injunctive relief against further expansion, development and operation of the Snow Bowl in violation of these enactments. (Record, J.A., I, pp. 87-117; App. "A" and "B", pp. 39-50, 52, 78-85.)

Through its Order and Memorandum Opinion of June 12, 1981 and June 15, 1981, the District Court, Charles R. Richey, District Judge, ruled that Respondents had not violated 16 U.S.C. §497 because the dual permit practice employed at the Snow Bowl was both lawful in itself under the 1897 Organic Act and had been implicitly ratified by Congress. However, the District Court ruled that Respondents had violated the National Historic Preservation Act and its implementing regulations by failing to consult with the Arizona State Historic Preservation Officer to determine if the Peaks as an entity were eligible for listing on the National Register of Historic Places. Accordingly, the District Court ruled in favor of the Respondents on all of the Wilsons' claims except those arising under the National Historic Preservation Act, as to which it ruled against the Respondents and remanded the matter to the Agriculture Department for compliance with that Act. (App. "B", pp. 78-85.)

The consultation between the Coconino National Forest Supervisor and the Arizona State Historic Preservation Officer under the District Court's remand order produced two conflicting views concerning why the San Francisco Peaks as an entity were ineligible for National Register listing. After applying the National Register criteria (36 C.F.R. §60.6) the Forest Supervisor determined that the Peaks were ineligible for listing because their significance was primarily religious rather than historical. (App. "G", pp. 142, 151-155.)

The Arizona State Historic Preservation Officer rejected the Forest Supervisor's understanding, calling it "more spurious than productive" because "[i]t can be documented that the Peaks area are a natural landmark for early settlers" in Northern Arizona and since the "[h]istorical recognition and use of the Peaks has not been limited to the historic and modern Hopi and Navajo people." Finding the Forest Supervisor's views concerning the Peaks' ineligibility for listing under the National Register criteria to be "too narrow a view" which lacked evidentiary support, the State Historic Preservation Officer found that "[t]he Peaks area has a long-standing place of importance in the history of the Hopi and Navajo; and while they may attach primary religious value to the Peaks, the *historical* aspects of those views cannot be ignored." In applying the National Register criteria to the Peaks, the State Historic Preservation Officer found that they were of preeminent importance to the history, culture, folklore and mythology of Southwestern American Indians, particularly the Navajos and Hopis; and, having served as a natural landmark for early travelers and settlers and having functioned as a laboratory for C. Hart Merriam's pioneering studies of bio-ecology, were equally significant to non-Indian patterns of American history and culture. (App. "H", pp. 160.)

Nevertheless, the Arizona State Historic Preservation Officer determined that the Peaks were ineligible as a matter of law for National Register listing notwithstanding their historical significance. In her view the National Historic Preservation Act protected only "a geographically definable area, urban or rural, possessing a significant concentration of linkages or continuity of sites" each of which possessed integral, historic significance and which in their aggregate created an area or district of historical significance. (App. "H", pp. 161-163.)

However, on September 17, 1981, six days after the Arizona State Historic Preservation Officer issued her findings, the Coconino National Forest Supervisor was informed in a letter from the Western Division Chief of the Advisory Council on

Historic Preservation that counsel for the Wilsons and others had provided the Advisory Council with "information [which] is in sufficient detail to raise a valid question as to the eligibility" of the San Francisco Peaks as an entity for National Register listing. The Advisory Council's Western Division Chief further informed the Forest Supervisor that "we recommend that you request a determination of eligibility from the Secretary of the Interior" concerning the Peaks as an entity. As early as August 23, 1978, the Interior Department itself, through its Regional Environmental Officer, told the Coconino National Forest Supervisor in a letter that the National Register criteria "for 'District' nomination of cultural resources which have a common theme and significance may be applicable to the case of [the] Snow Bowl or the San Francisco Peaks as a whole." (App. "K", "L", pp. 174-180.)

The final decision of the Agriculture Department respecting the remand proceedings was made by the Chief Forester, acting through his designated deputy, R.M. Housley. Without indicating the reasons for his decision and without consulting with or deferring to the Interior Secretary, the Chief Forester unilaterally ruled in a single, unexplained and undocumented sentence, that "as an entity, the geographical area known as the San Francisco Peaks is not eligible for nomination to the National Register." (App. "I", pp. 165-166.)

The Chief Forester did not resolve the difference of opinion between the Forest Supervisor and the Arizona State Historic Preservation Officer concerning the basis for the Peaks' ineligibility for National Register listing. At no time did any official of the Agriculture Department or the Forest Service ever seek to justify the determination that the Peaks were ineligible for listing on the grounds that they did not possess the "unique" qualities which led the Interior Secretary to list on the National Register other mountains, cited to the Chief Forester by the Wilsons during the remand proceedings, possessing similar or identical historical and cultural attributes to those possessed

by the San Francisco Peaks. (App. "I", pp. 165-166; Record, J.A., V. pp. 1595-1611.)

At the conclusion of the remand proceedings and upon Respondents' motion for entry of final judgment, the District Court issued its Memorandum Opinion and Order entering final judgment in favor of Respondents. The District Court held that Respondents were not under any obligation to refer the issue of the Peaks' eligibility for National Register listing to the Interior Secretary and that they had not committed an abuse of discretion in determining that the Peaks as an entity were ineligible for listing since the Peaks may not have possessed the combination of unique attributes which caused the Interior Secretary to list other similar mountains in the National Register, a view first advanced by Respondents' counsel in the District Court and never employed or articulated by the Agriculture Department or the Forest Service. (App. "C", pp. 92-94.)

On May 20, 1983 the Court of Appeals issued its Opinion and entered its Judgment affirming in all respects the District Court's May 14, 1982 and June 12, 1981 Orders. (App. "A" and "J", pp. 1-50,167.) However, five months earlier while the case was under advisement in the Court of Appeals, Northland Recreations, Inc., sold the Snow Bowl improvements to Fairfield Snow Bowl, Inc., an Arizona corporation; and on December 27, 1982 the Forest Service issued both a Special Use Permit under the 1897 Organic Act and a Term Permit under 16 U.S.C. § 497 to Fairfield to operate the Snow Bowl. In their material features these permits are identical to the Northland permits described earlier, except that they expire in the year 2002 and state that they supersede the Northland permits which were terminated upon the sale of the Snow Bowl improvements.

REASONS AND ARGUMENT FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION NULLIFIES THE STATUTE, 16 U.S.C. §497, LIMITING THE SIZE OF PRIVATE RECREATIONAL DEVELOPMENTS IN THE NATIONAL FORESTS THROUGH A CONSTRUCTION OF THE 1897 ORGANIC ACT, 16 U.S.C. §551, WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND THE PROPERTY CLAUSE OF THE UNITED STATES CONSTITUTION.

Through 16 U.S.C. §497 Congress authorized the Agriculture Secretary "to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing and maintaining hotels, resorts, and any other structure or facility necessary or desirable for recreation, public convenience or safety." Congress did not differentiate between the kinds of permits to which the 80-acre limitation of 16 U.S.C. §497 was applicable nor did it qualify the kinds of recreational uses to which it applied, but instead applied the act's acreage limit to all such uses.

Nevertheless, the Court of Appeals holds in this case that the Agriculture Secretary may permit private entrepeneurs to use and occupy MORE THAN 80 ACRES through the combined use of "term permits" for 80 acres or less given under 16 U.S.C. §497 and so-called revocable permits for any amount of additional acreage issued under the third section of the 1897 Organic Administration Act [Organic Act] now codified in 16 U.S.C. §551 which allows the Secretary to "make such rules and regulations and establish such services as will insure the object of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

By upholding this so-called dual-permit practice, the Court of Appeals' decision allows the Agriculture Department to create in the national forests large-scale, private, recreational developments, such as downhill skiing facilities like the Snow Bowl here, even though the land use included within the so-called revocable permit is in fact essential to and coestensive in duration with that which is authorized by the 80-acre permit and which neither would nor could exist independently of or without the land use activities included under the 80-acre permit.

To validate this practice, the Court of Appeals employs substantive and methodological principles which conflict with the decisions of this Court; and by effectively repealing 16 U.S.C. § 497, grants to the Executive a measure of power which is at odds with the Constitution's Property Clause. Speaking in dissent, Justice Blackmun, joined by Justices Brennan and Douglas, acknowledged the substantive importance of this issue when he emphasized that, "as the Court . . . so plainly reveals, the issues on the merits are substantial and deserve resolution" because "they pose the propriety of the 'dual permit' device as a means of avoiding the 80-acre 'recreation and resort' limitation imposed by Congress in 16 U.S.C. § 497, an issue that apparently has never been litigated and is clearly substantial in light of the congressional expansion of the limitation in 1956, arguably to put teeth into the old, unrealistic five-acre limitation." *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972) [Blackmun, J. dissenting].

A. The Court of Appeals' Holding Conflicts With This Court's Decisions Construing The Organic Administration Act of 1897.

This issue is even more substantial now than Justices Blackmun, Brennan and Douglas perceived it to be ten years ago in their *Sierra Club* dissents. Since the dual permit practice is dependent upon and justified by the 1897 Organic Act, 30 Stat.

35, 16 U.S.C. §551, a clear conflict now exists between the Court of Appeals' interpretation of that act and the construction of the Organic Act articulated by the Court five years ago.

In *United States v. New Mexico*, 438 U.S. 696 (1978) the Court held that the Executive Office could not reserve national forests for recreational use under the 1897 Organic Act. The Court construed the 1897 Act as follows:

> The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes—"[t]o conserve the water flows and to furnish a continuous supply of timber for the people." [citation omitted.] *National forests were not to be reserved for* aesthetic, environmental, *recreational*, or wildlife *purposes*. [quotation from floor debates omitted.] Administrative regulations at the turn of the century confirmed that national forests were to be reserved for only these two limited purposes. 438 U.S. at 707-708, emphasis added.

The logic of the *New Mexico* holding is clear. The power of the Executive to regulate the use and occupancy of the national forests after it creates them under the Organic Act cannot be greater in scope than the power to create the forests reserves in the first instance. Thus, since the 1897 Organic Act forbids the Executive to reserve national forests for recreational uses, that Act likewise forbids the Executive to devote the use and occupancy of the national forests to recreational purposes and uses after the reserves have been set aside. To reason otherwise would permit the Executive Office to accomplish indirectly, through a mere power to regulate the use and occupancy of the national forests, an object which Congress plainly intended to forbid in authorizing the Executive to set aside national forests under the 1897 Act.[1]

Notwithstanding the *New Mexico* holding, the Court of Appeals holds that from the first decade of this century the 1897 Organic Act empowered the Forest Service to issue permits for private occupancy and use of the forest reserves for all purposes without limitation as to the area of land covered. From this premises, the Court of Appeals reasons that the Act of March 4, 1915, 38 Stat. 1101, 16 U.S.C. §497, merely supplemented that pre-existing authority. This holding conflicts with this Court's construction of the 1897 Organic Act articulated in the *New Mexico* case and is at odds with the Court's clear ruling in 1911 that under the Organic Act *"the Secretary could not make rules and regulations for any and every purpose" but only such as are "clearly indicated and authorized by Congress." United States v. Grimaud*, 220 U.S. 506, 516 (1911), emphasis added.[1]

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[1]That Congress never intended to permit the creation or use of the national forests for recreational purposes under the 1897 Organic Act, but in fact understood that such a use would be prohibited, is unmistakeably clear in the Act's legislative history. Immediately prior to the Act's passage, Congressman McRae, the Act's architect and principal sponsor, stated to Congress that national forests "are not parks," thus echoing a similar admonition voiced in 1893 when, in introducing the prototype of the 1897 Act, he informed Congress that the bill was "not dealing with parks, but forest reservations, and there is a vast difference." 30 *Cong. Rec.* 966-967 (1897); 25 *Cong. Rec.* 2373 (1893) (remarks of Congressman McRae). The difference was that parks alone were for public pleasure and recreation; forest reserves were not and could not be so used. This fact is further evidenced by the Act of February 28, 1899, 30 Stat. 908, 16 U.S.C. §495, in which Congress specifically authorized the use of national forest land for sanitariums, hotels and camps by private citizens adjacent to mineral or medicinal springs for public "health and pleasure." Both the Secretary and Congressional sponsors urged passage of this bill because, as Congressman Tongue put it, "under existing regulations and forest reservation laws *there is no power vested in any of the Departments to make any provision under the laws for the occupation of these grounds by those who seek these springs for the erection of sanitariums, for buildings, or even cottages for persons desiring to fit them up, or even for camp grounds.*" 31 *Cong. Rec.* 3858 (1898); *H. R. Rep. No. 942*, 52nd. Cong., 2d. Sess. (1898), p. 2.

If the national forests could not be created, occupied, or used for recreational purposes under the 1897 Organic Act as construed in the *New Mexico* holding, the Act of March 4, 1915, 38 Stat. 1101, 16 U.S.C. §497, at least in so far as private, commercial construction and development of recreational facilities is concerned, constitutes the first and only possible grant of authority for recreational developments which were long-term in nature and which required land use practices in which forest lands were stripped of trees without any foreseeable intent to reforest them. In view of the logical implications of the *New Mexico* holding's construction of the Organic Act, the 1915 Act neither supplemented nor repealed anything, but instead granted a power not otherwise existing with respect to the general (recreational) and specific (tree stripping) activities involved in private, commercial development of recreational facilities in the national forests. More importantly, the 1915 Act was, at the same time, a clear and positive limitation upon both the area ("*not exceeding* 5 acres") and the period of time ("*not exceeding*" 30 years) within which only "summer homes, hotels, stores or other structures" would be permitted.[2]

The Court of Appeals' attempt to fathom a different understanding from the legislative history of the 1915 Act is genuinely

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[2]Significantly, as originally proposed and introduced, the 1915 Act contained NO acreage limitation, but because of the Congressional fear, as Senator Gallinger put it, that "the Department of Agriculture might let them (the recreational developers) have a hundred or 50 or any amount" of land, the Senate amended the bill by imposing a ten (10) acre limit. 51 *Cong. Rec.* 9101 (1914) (colloquy between Senators Gallinger and Jones). Even 10 acres was deemed too excessive by the House which limited it to five (5) acres. 52 *Cong. Rec.* 5505, 5323 (1915); 38 Stat. 1101 (1915). The clear and precise limitations as to area, duration and kinds of development were deemed essential because Congress envisioned only recreation which was NOT destructive of natural, forest conditions. As Congressman Hawley, the sponsor, put it, "people can go and enjoy the scenery and the fishing and hunting" in "forests that are very beautiful in natural scenery" and "natural wonders." 52 *Cong. Rec.* 1787 (1915) (remarks of Congressman Hawley).

unconvincing. The Court of Appeals' quotation of Congressman Hawley's remarks, that the Organic Act allowed citizens to go into the national forests "and build a *temporary camp*, put up a *tent*, or a *little camp* of some kind" but *"does not enable them* to put up any important building, or *to justify any considerable expenditures,"* (App. "A", p. 43, quoting 52 Cong. Rec. 1787 [1915]), proves nothing more than that prior to the 1915 Act no authority whatever existed for developments generically similar to skiing facilities because ski runs, lifts and related facilities are not in any way similar or comparable to "temporary camps," "tents," or "little camps." Instead, they are essentially permanent in nature, require substantial alteration of the land and forests of the reserves, and destroy large areas of trees and foliage for decades and generations which "temporary camps" and "tents" plainly do not. Moreover, the stripping of trees for ski runs and other facilities requires substantial expenditures of man hours and heavy equipment, not only in their initial creation but also in their required, yearly maintenance and grooming.[3]

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[3]It should be noted that the 1897 Organic Act contained a general prohibition against strip-cutting of timber over whole acres of woodlands by specifying in Section 4 that only dead and physiologically mature trees could be cut for commercial purposes. 30 Stat. 35. Moreover, the 1897 Act defined with particularity in Sections 5 and 7 only three land uses in which timber could be cleared (wagon roads, schools and churches, the latter two being limited to two acres and one acre, respectively). In its 1899 Report to Congress, the Forest Service itself condemned the very land use practice necessary to ski slope construction when, in discussing the silviculture technique of clear-cutting, it warned that *"in hilly country the strips (of cut over trees) must not be made in the direction of the slope for water would wash out the soil and seed." Report Upon The Forestry Investigations of the United States Department of Agriculture, H. Doc. No. 181,* 55th Cong., 3d. Sess (1899), p. 288, emphasis added; 30 Stat. 35-36 (1897).

B. The Court of Appeals' Use Of Unsuccessful Legislative Material Conflicts With The Decisions Of This Court And Is Misleading.

To circumvent the clear language of limitation of the 1915 Act, the Court of Appeals notes that "Congress in the 1930's and 1940's considered several bills that would have expanded the Forest Service's authority to grant term permits, but enacted none of them." From this it concludes that "these bills are nonetheless significant because the reports they generated gave Congress clear notice that the Forest Service was continuing to issue revocable permits for recreational uses and, further, was issuing dual permits. (App. A, p. 44-45.)

In its methodology the Court of Appeals' reliance upon the history of *unsuccessful* legislation to validate executive conduct under the doctrine of congressional acquiescence patently violates the settled and repeated holdings of this Court. The court squarely rejected the Court of Appeals' methodology when in 1959 it held that *"we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed"* by Congress. Just as the Court has cautioned that "it is at best trecherous to find in Congressional silence alone the adoption of a controlling rule of law," so too has it reiterated that an "interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance." *T.I.M.E. v. United States*, 359 U.S. 464, 478 (1959); *N.L.R.B. v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130, note 4 (1971); *Gemsco v. Walling*, 324 U.S. 244, 265 (1945); *United States v. Wise*, 370 U.S. 405, 411 (1962).

In its substantive character, the Court of Appeals' reliance upon unsuccessful legislation is, at best, self-contradictory and,

at worst, both misleading and not candid.[4] As to the former, the very letters of the Agriculture Department quoted and emphasized by the Court of Appeals clearly demonstrate that the Department represented no more to Congress than that its claimed, Organic Act permit power authorized uses *only "of relatively short duration or [which] entail only small capital investments."* (App."A", p. 45-46, quoting H.R. Rep. No. 805, 80th Cong., 1st. Sess., p. 2 (1948)). Hence, under even the Agriculture Department's own claimed authority, it could NOT lawfully employ its Organic Act permit power to allow the construction and maintenance of ski runs since these are costly, long-term uses which radically alter natural, forest conditions. Thus, under the most generous view of the very material quoted by the Court of Appeals, Congress could not possibly have obtained notice from the Executive Office that

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[4]Although the Court of Appeals makes much of the reference to a dual permit practice in a Senate Report on S. 773 (1932), it fails to note that the report does not represent that such a practice or the revocable permit was employed for long-term occupancies destructive of natural forest conditions. More importantly, the Court of Appeals fails to acknowledge that in the hearings on S. 773 the Forest Service and proponents of the bill advocated an increase in the acreage limit precisely because "you could not get ski grounds on 5 acres," (Mr. Martin), thus representing to Congress that such facilities were authorized only by the 1915 Act, not otherwise, and could not lawfully exist but for an increase in that Act's acreage limit. Nevertheless, noting that an increase from 5 to 80 acres would greatly increase the destruction of natural forest conditions and would exacerbate the existing potential to evade or circumvent the acreage restrictions by creating "means whereby commercial interests might get control of a large part of the public domain," (Congressman Polk), Congressmen expressed negative sentiments about and/or opposed the bill to such an extent that the Assistant Forester conceded that "an 80-acre figure, with a 30-year term seems to have made an adverse impression" which he sought to correct by warranting that, if the increase were enacted, "those are the maximum limits" for all recreation uses. *See Hearings Before A Subcommittee of the House Committee of Agriculture on S. 773*, 72d. Cong., 2d. Sess. (February 17, 1933), pp. 3-5, 7-8, 15-17, 19-21 (remarks of Mr. Martin, Assistant Forester Kneipp, and Congressmen Polk, Adkins, Clarke and Doxey.)

a claimed Organic Act use permit power was being used to allow costly, long-term land uses, such as ski run construction and maintenance, in which private entrepeneurs permanently alter natural forest conditions within areas of the national forests exceeding the acreage limits imposed by the 1915 Act.

Even more troubling is the Court of Appeals' misleading and uncandid use of the unsuccessful legislative material which it cites, quotes, and relies upon. In the House and Senate Reports of 1947-1948 THERE IS ABSOLUTELY NO MENTION WHATEVER OF A DUAL PERMIT PRACTICE, either in the text of the Reports or in the Acting Agriculture Secretary's appended letter.[5] Significantly, Acting Agriculture Secretary Brannan's letter unconditionally avows that the 1915 Act is *"the only present authority for long term occupancy permits."* More importantly, the Acting Secretary's letter affirmatively represents to Congress that winter sports facilities, like the Snow Bowl here, were considered by the Department itself to be long-term uses authorized *only* by the 1915 Act whose authority was, in the Department's view, inadequate to permit such uses in the national forests. Acting Secretary Brannan informed Congress in his letter that the "disadvantages of the

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[5]The 1948 bill to which these reports have reference was H.R. 1801 which, as drafted and recommended by the Agriculture Department, would have raised the 1915 Act's acreage limit from five to 80 acres for all national forest lands. However, the House Committee limited the 80 acre increase to Alaska forest land only and retained the five acre limit for all other national forests in which form it was passed by Congress. 16 U.S.C. §497a. In the Committee hearings Congressman Goff of Idaho explained to Assistant Chief Forester Granger that a nation-wide increase in the acreage limit was not warranted because of the concern for "the possible abuses of the authority given by the bill" whose scope was thought to be "very broad." Goff further noted the fear that the bill was inimical to the desire "not to get too many commercial establishments in our National Forest areas" so as to enhance "the preservation of these beautiful areas." *Hearings Before Subcommittee No. 2 of the House Committee on Agriculture on H.R. 1809*, 80th Cong., 2d. Sess. (June 19, 1947), pp. 5-6.

present law is its fixation of five acres as the maximum area for which a term permit can be issued to any one person or association" and that "5 acres frequently is quite inadequate" for such uses as "winter sports facilities [which] are often strung out, especially ski lifts, etc. and need elbow room." *H.R. Rep. No. 805*, 80th Cong., 1st. Sess. (1947), p. 2; *S. Rep. No. 899*, 80th Cong. 2d. Sess. (1948), p. 2.

When in 1956 Congress amended the 1915 Act, it did NOT strike the acreage limit as it would have done had security of a permittee's tenure been the only purpose. Although it could have selected any acreage limit or none at all, Congress not only chose an 80-acre limit but also elected to frame it within the clearest, most emphatic language of limitation known to the law (which, in fact appears eight (8) times in the amended act).[6] Significantly, the 1956 amendment does not differentiate between the kinds of permits to which the 80 acre limit applies but, instead, refers broadly to all permits for the specified use of recreation. 16 U.S.C. §497.

More importantly, Congress extended the scope of recreational land uses subject to the new acreage limit to the maximum extent possible and far beyond the comparatively narrow objects over which the original 1915 Act operated. While the original enactment applied to the "construction of summer homes, hotels, stores, and other structures for recreation," 38 Stat. 1101, Ch. 144, the 1956 amendment extended the land-use activities to which the acreage limit was applicable far beyond only structures and, for the first time ever, applied

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[6]This seemingly obvious point becomes hopelessly lost in the Court of Appeals' decision and thus merits emphasis. "The language is not only unmistakeably clear, but mandatory . . . because the words 'not exceeding' are express words of limitation only—words which control the term(s) (associated with it) . . . and fix the line beyond which . . . (they) cannot go." The "words 'not exceeding,' in themselves are words not of grant or appointment but of limitation only." *Boston & M.R.R. v. United States*, 263 Fed. 578, 579 (1st. Cir., 1920); *City of Kingsville v. Meredith*, 103 F.2d 279, 281 (5th Cir., 1939).

it unqualifiedly to *"any other* structure or *facility necessary or desireable for recreation, public convenience, or safety."* 70 Stat. 708, Ch. 711, 16 U.S.C. §497. If Congress had intended to confine the act's scope only to buildings or structures, it would never have performed the purely futile act of radically altering the law's terminology and of separately specifying that the acreage limit applied without qualification to *"any other facility"* which was either *"necessary or desireable for recreation."* Neither the Court of Appeals nor the Executive have any power to eradicate or limit this plain, clear, and unqualified terminology chosen by Congress.[7]

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[7]The term "facilities" is "a widely inclusive term embracing *anything* which aids or makes easier the performance of the activity involved in the business of a person or corporation," and "is broad enough to include . . . the grounds" adjacent to structures. *Chess v. Widmar*, 635 F.2d. 1310, 1315, note 4 (8th Cir., 1980), *aff'd sub nom. Widmar v. Vincent*, 445 U.S. 263 (1981); *Hartford Electric Light Company v. F.P.C.*, 131 F.2d 953, 961 (2nd. Cir., 1942), *aff'd*, 319 U.S. 61 (1943). This is emphatically not a case in which the breadth of that term may be constricted or nullified under the doctrine of ratification through re-enactment because that principle NEVER APPLIES and no administrative practice is ever adopted "where there are material changes or additions in the later act" or "where the law is plain and clear," both of which factors are here present. "Here there has been an entire rephrasing and restructuring of the statutory provision, a circumstance which always warrants a fresh determination of meaning free of the influences of old decisions, interpretations and administrative practices." *Volkswagen of America, Inc. v. United States*, 340 F. Supp. 983, 989 (Cust. Ct., 1972), *aff'd.* 484 F.2d. 703 (Cust. & Pat. App., 1973); *Biddle v. C.I.R.*, 302 U.S. 573, 583 (1937); 73 *Am. Jur. 2d.* "Statutes" §324, p. 471. Even if Congress had clear notice of a past, dual-permitting practice *and* an intent to continue it—and it did not—the radical restructuring and rephrasing of the 1956 amendment more properly places it within the rule that where "the legislature has responded to (the agency's) past interpretation and administration with severe censure, the general presumption that the agency has correctly discerned and implemented the intent of the legislature, would seem singularly inappropriate" and will not be applied. *Cy Ellis Raw Bar v. District of Columbia Redevelopment Land Agency*, 433 F.2d. 543, 548 (D.C. Cir., 1970); *March v. United States*, 506 F.2d. 1306, 1316-1317 (D.C. Cir., 1974).

Inspite of the broad sweep and plainly unqualified terms of the 1956 amendment's acreage limitation on recreational uses, the Court of Appeals reasons that ski runs are not within its scope because, in a committee report "Congress expressed approval" of the dual permit practice through the committee's statement that "[t]he Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897" and that "[i]ts authority to issue term permits, and the extent to which such authority would be broadened" under the 1915 Act were specified in the amendment. (App. "A", p. 46 quoting in part S. Rep. No. 2511, 84th Cong., 2d. Sess. (1956), p. 1 and H.R. Rep. No. 2792, 84th Cong., 2d. Sess (1956), p. 2.) This statement neither explicitly nor implicitly suggests or permits the construction that the two permits had been or could in the future be combined or that revocable permits could be used for long-term occupancy of the forest reserves and thus does not permit the reading which the Court of Appeals attaches to it. Substantively, the Committee Report's view of the 1897 Act directly conflicts with the Court's interpretation of that Act in the *New Mexico* and *Grimaud* holdings discussed earlier, and we know of no rule of law which permits an intermiediate appellate court to prefer a single, loose sentence in a committee report to this Court's clear precedent. Methodologically too, the Court of Appeals' transformation of a committee report's views of the 1897 Act into judicial precedent which is at odds with the Court's *New Mexico* and *Grimaud* decisions is anathema to the Court's repeated admonition that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance," especially where they are manifested in "a mere statement in a conference committee report." *United States v. Southwestern Cable Company*, 392 U.S. 157, 170 (1968); *Consumer Products Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 117-118, note 13 (1980); *United States v. Clark*, 445 U.S. 23, 33, note 9 (1980); *United States v. Wise*, 370 U.S. 405, 414 (1962).

Even if the Court's precedents in the *New Mexico* and *Grimaud* decisions could be ignored, one still could not possibly conclude that in 1956 Congress had notice of or ratified, either expressly or implicitly, the use of revocable permits for ski runs, landing fields, or any long-term, private use of the national forests requiring alteration of natural forest conditions, let alone the combined use of such permits with term permits. This is so because the letter-comments of the Acting Agriculture Secretary included in both the House and Senate Reports on the bill MADE NO REFERENCE WHATSOEVER TO THE COMBINED USE OF TERM AND REVOCABLE PERMITS and thus, like the committee reports themselves, were inherently incapable of giving Congress any notice that it was being asked to ratify any kind of departmental practice. Equally important, as in the late 1940's and early 1930's, the Acting Agriculture Secretary himself claimed no more for the revocable permit authority than that it was applied and used for short-term, temporary occupancy only and functioned only as authority, to quote his letter, "for uses for which long-term tenure is unnecessary or undesirable." In that same letter endorsing the 1956 amendment, the Secretary again represented to Congress that the amendment was essential to permit the use and occupancy of forest lands *"up to 80 acres for such* public and semi-public *uses as landing fields, resorts, camp grounds, picnic areas,* organization camps and *ski lifts,* and to industrial and commercial enterprises," thus placing the very kinds of uses here at issue squarely within the 1956 amendment and completely outside the scope of any claimed, Organic Act revocable permit power. *H.R. Rep. No. 2792,* 84th Cong., 2d. Sess. (1956), p. 3; *S. Rep. No. 2511,* 84th Cong., 2d. Sess. (1956), p. 3 [Letter of Acting Agriculture Secretary True D. Morse.]

Of vital importance here is the cold fact, ignored by the Court of Appeals, that the Department's own examples of long-term land uses cited by the Secretary's 1956 letter-com-

ments as being the kinds of uses for which additional authority was necessary and which would "not exceed 80 acres," are generically identical to ski runs, a fact which vitiates the Court of Appeals' holding. While a ski lift may be a structure, a landing field is not but is often only a dirt strip providing primary or secondary access to some structural or natural source of recreation. Like a ski run, a landing field is an area of land cleared of trees, stumps and rocks by men and machinery which will be used for a period of years, not as a forest, but as a means to the pursuit of some sport or pleasure. A ski run is no different in kind or in its essential land use characteristics from a landing field and is no less a "facility" subject to the 80-acre limit than the landing field specifically cited by the Agriculture Secretary's letter to the 1956 Congress. In view of the plain and unqualified sweep of the 1956 amendment's 80-acre, recreational use limitation, the Secretary's express representations to Congress that land use activities identical to ski runs were long-term uses subject to the 80-acre limitation, and the *complete absence* of anything in the committee reports which would give clear notice to Congress that the Department had in the past and would continue in the future to avoid the acreage limitation through the combined use of revocable and term permits, the Court of Appeals simply exceeded its constitutional authority by effectively repealing the plain, clear, and positively limiting words of 16 U.S.C. § 497.[8]

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[8]Under this Court's *New Mexico* holding the Forest Service possessed absolutely no power other than that conferred in 16 U.S.C. § 497 to manage and use the national forests generally for outdoor recreation until 1960 when Congress enacted the Multiple Use-Sustained Yield Act, 16 U.S.C. § 528, *et seq.* In the *New Mexico* case the Court specifically rejected the Government's contention that the 1960 Multiple Use Act merely confirmed powers which had always existed and held that the 1960 Act was "intended to *expand* the purposes for which the national forests should be administered," 438 U.S. at 713, note 21, thereby creating spheres of authority which had not existed under the Organic Act.

C. *The Court of Appeals' Decision On The Revocability Issue Is At Odds With The Property Clause And Conflicts With A Ninth Circuit Decision And Attorney General Opinions.*

The Court of Appeals simply nullifies the 1956 amendment when it superimposes upon it a fictitious exception for ski runs. The undeniable, physical fact is that the life of a ski run is co-extensive with and equal to that of the ski lift, and the former is no less permanent than the latter. The magnitude of tree stripping, land clearing, or earth moving and grading necessary to create ski runs is at least equal to that required for ski lifts and, in fact, is arguably greater since there are more runs than lifts in skiing facilities. Moreover, a ski run is useless and

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Moreover, the *New Mexico* decision holds that the 1960 Multiple Use Act, while expanding the uses of national forest land to include outdoor recreation, "indicates that recreation, range use, and fish purposes are 'to be supplemental to, but not in derogation of, the purposes for which the national forests were established' under the Organic Administration Act of 1897" and that, as such, recreational uses constitute "secondary purposes" whose scope would not be enlarged by implication "without legislative history to the contrary." 438 U.S. at 714-715. Nothing in the general terms of the Multiple Use Act or its legislative history suggests that it was intended to repeal the clear and positive acreage limitations of 16 U.S.C. § 497, amended only four (4) years earlier, and no such reading of the 1960 Act is legally permissible since "repeals by implication are not favored." *Watt v. Alaska*, 451 U.S. 259, 276 (1981).

In addition, the *New Mexico* decision indicates that the secondary purposes established by the 1960 Multiple Use Act, like outdoor recreation, could not exist where their land use activities were detrimental to the primary purposes of the national forests: water and timber conservation. Stripping of trees for ski slopes is by its nature injurious to both because it promotes erosion and permanently reduces timber acreage. The Fourth Circuit has held that the 1960 Multiple Use Act did not authorize the Forest Service to employ the silviculture technique of "clear-cutting" even though reforestation would recur. *West Virginia Division of Izaak Walton League v. Butz*, 522 F.2d. 945, 953-954 (4th Cir., 1975). The more egregrious activity of stripping all trees without any foreseeable intent to reforest, as in the case of ski slopes, would be ever more forcefully forbidden by both the 1960 and the 1897 Acts.

would not exist but for the ski lifts (and vice-versa), and the simple axiom that skiers who ascend the mountain on ski lifts must descend on the ski runs renders the runs a necessary, essential and primary "facility" as that term is used in 16 U.S.C. § 497 required for the sport of downhill skiing.

Since both ski runs and ski lifts are inseparable parts of a unified land development and are interlocked and interrelated in their nature, the permits which authorize them partake of the same essence; and a so-called revocable permit exceeding 80 acres for ski runs, when linked to a term permit for ski lifts, is in fact a term permit for more than 80 acres regardless of the label given to it. Under these circumstances merely labeling as revocable the 753-acre Special Use Permit for the Snow Bowl's ski runs does not make it so in substance and fact, especially in view of the fact, not questioned by the Court of Appeals, that it is expressly linked in its terms, fee computation schedule and expiration date with the 24-acre Term Permit and, under the Agriculture Department's own regulations, cannot be revoked without a rational basis and administrative review procedures. Being inextricably tied by the nature of its land use (which cannot stand alone), money, improvements and the unitary recreational purpose of the entire ski area development which underlies both permits, the Special Use Permit is secured for precisely the same period of time as the Term Permit inspite of the clear mandate of 16 U.S.C. § 497. To reason otherwise would flout the axiom that "the Court will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem." *Gay v. Parpart*, 106 U.S. (16 Otto) 679, 699 (1883).

As such, the Court of Appeals' decision collides with opinions of the Attorney General and an early Ninth Circuit decision respecting the power to issue and the revocability of the 753-acre Special Use Permit. The Attorney General's Opinions indicate that a permit for the use of government property is revocable and may issue as such only when "however long con-

tinued, *the occupancy is subject* in theory and *in fact to immediate termination at any time at the will of the Government.*" These opinions further hold that "an alienation or what amounts to a transfer or surrender of Government property, by which title, control or possession of the Government is lost reduced, or abridged" may occur only in the manner specified by Congress and not otherwise. 34 *Op. Att'y Gen.* 320, 323, 327-328 (1924); accord, 35 *Op. Att'y Gen.* 485, 489 (1928), emphasis added.

And, in *Osborne v. United States*, 145 F.2d. 892 (9th Cir., 1944) the Ninth Circuit Court of Appeals squarely held that 16 U.S.C. §551 empowers the Forest Service to do no more than to "make and enforce regulations appropriate to the *preservation of natural growth*" in the national forests and that *"the mere authority given the forest service to make appropriate regulations carries with it no authority to alienate for any period of time any phase of government right over the full use of its land."* The Ninth Circuit stressed that "[n]o grant of United States property may be made except by virtue of Congressional authorization" and then only in the manner specified by Congress, not otherwise. 145 F.2d. at 896, emphasis added, citing *Art. 4, §3, Const.* and *Shannon v. United States*, 160 Fed. 870 (9th Cir., 1908).

The result reached by the Court of Appeals on the revocability issue conflicts with these authorities since the 753-acre Special Use Permit for the Snow Bowl creates a de-facto alienation of national forest land in favor of private developers in a manner NOT authorized by Congress. When linked to the Term Permit, the Special Use Permit exceeds the 80-acre limit of 16 U.S.C. §497 even though it in fact gives the permittee the same security of tenure provided by that statute. By nullifying the plain will of Congress manifested in 16 U.S.C. §497, the Court of Appeals' decision is at odds with the Property Clause, the *Osborne*, *New Mexico* and *Grimaud* holdings and possesses far reaching and substantial implications respecting the disposi-

tion of government land to private entrepeneurs which transcend the land use statutes here at issue and affect the interrelationship of Congress and all Executive Departments in matters of public land disposition.[9] These factors, coupled with the direct conflict between the Court of Appeals' decision and this Court's substantive interpretation of the 1897 Organic Act raise issues of substantial and far-reaching importance which call for this Court to review the issue of the validity of the dual permit practice through its certiorari power.

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[9]Neither the existence of some 200 ski developments, "most" of which employ dual permits nor the fact that the Forest Service has continued to issue dual permits since this Court's *Sierra Club* decision, *supra*, constitutes relevant, persuasive or convincing proof of the validity of the dual permit practice any more than such factors should preclude full review of that issue. This Court has consistently held that *"it matters not what the practice of the department may have been or how long continued"* where the agency's practice is contrary to a statute, here 16 U.S.C. §497, which is "clear and explicit in its language," is "inconsistent with a statutory mandate" or "frustrates the congressional policy underlying a statute." *United States v. Graham*, 110 U.S. 219, 221 (1884); *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 746 (1973). Moreover, while the legitimacy of other ski areas has never been questioned, at the Snow Bowl here new permits were issued to a successor corporation while the dual permit issue was under judicial scrutiny. In cases like this the Court has not shyed from full review and a principled decision, notwithstanding the size of investment capital at stake, but has employed its inherent, equitable power to afford full relief to a prevailing plaintiff while staying or applying prospectively its decision to other individual cases where substantial, inequitable results would occur or where the orderly administration of government would be disrupted. *Cipriano v. Houma*, 395 U.S. 701, 706 (1969); *Northern Pipeline Construction Company v. Marathom Pipe Line Company*, U.S. , 102 S.Ct. 2858, 2880 (1982).

Moreover, administrative practice since the Ninth Circuit's dictim in the *Sierra Club* case, *supra*, is irrelevant because this Court has repeatedly held that it "does not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation" of a statute since "the original legislative language speaks louder than such judicial action." *Jones v. Liberty Glass Company*, 332 U.S. 524, 533-544 (1947). Indeed, when Congress ended the Mineral King controversy involved in the *Sierra Club* case by divesting the Forest Service of jurisdiction over the valley and adding it to the Sequoia National Park, Congress specifically prohibited *"the development of permanent facilities for downhill skiing in the area,"* 16 U.S.C. §45f(h), 92 Stat. 3483 (1978), emphasis added, thus employing landguage identical to that containedin 16 U.S.C. §497 so as to proscribe ski runs, lifts, tows, lodges and anything else connected with such developments.

II. THE COURT OF APPEALS' HOLDING THAT THE SAN FRANCISCO PEAKS AS AN ENTITY ARE INELIGIBLE FOR PROTECTION AND LISTING UNDER THE NATIONAL HISTORIC PRESERVATION ACT CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND IS CONTRARY TO THE TERMS OF THE ACT, ITS IMPLEMENTING REGULATIONS AND INTERIOR DEPARTMENT PRACTICE.

Section 101a(a)(1)(A) of the National Historic Preservation Act, 16 U.S.C. §470a(a)(1)(A), authorizes the Interior Secretary and him alone, "to expand and maintain a National Register of Historic Places" by listing thereon "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture." The duly promulgated regulations likewise designate the Interior Secretary to be the final arbiter of disputes or questions involving the eligibility of properties for inclusion in the National Register of Historic Places by providing in 36 C.F.R. §800.4(a)(3) that *"if* either the Agency Official or *the State Historic Preservation Officer find that a property meets the National Register Criteria*, or a question exists as to whether a property meets the Criteria, *the Agency Official shall request a determination of eligibility from the Secretary of the Interior"* whose opinion "shall be conclusive." *Accord:* 36 C.F.R. § 63.2(c).

In *Stop H-3 Association v. Coleman*, 533 F.2d. 434 (9th Cir., 1976), *cert. denied sub nom., Wright v. Stop H-3 Association*, 429 U.S. 999 (1976) the Ninth Circuit Court of Appeals enjoined the construction of a highway through the Moanalua Valley in Hawaii and upheld the Interior Secretary's determination that the Valley "may be eligible for inclusion in the National Register" because it "contains Kamanui, the valley of the great power and Waolani, the valley of the spirit which was, in tradition, 'the dwelling place of the gods' " and since "[t]he forests of the valley retain a traditional natural state associated with the legend and history of the area" and "Hawaiian folklore and tradition" which "continues into the 20th century." 533

F.2d. at 436, note 1. The Ninth Circuit further held that under the National Historic Preservation Act "the Interior Secretary is the ONLY official authorized to name properties to the National Register" and that "[t]he regulation [now 36 C.F.R. § 800.4 (a)(3)] expressly and unambiguously provides that 'if it is questionable' whether a property meets National Register Criteria, the responsible agency official *shall request* the Interior Secretary's opinion." 533 F.2d. at 441, 444, emphasis added; *accord: Aluli v. Brown*, 437 F.Supp. 602, 610 (D. Hawaii, 1977) *rev'd on other ground*, 602 F.2d. 876 (9th Cir., 1979) [entire island "might qualify" for listing].

Likewise, in *New Mexico Navajo Ranchers Association v. Interstate Commerce Commission*, 702 F.2d. 227 (D.C. Cir., 1983) a different panel of the Court below, speaking of an area "rich in . . . sites of religious significance to the Navajo," held that the I.C.C. violated the National Historic Preservation Act by failing to defer to the Interior Secretary before it approved construction of a rail line through that area. 702 F.2d. at 232. "Where, as here, a factual question within the primary responsibility of a sister agency [Interior] is relevant to the ICC's determination, the ICC should ordinarily defer by staying its decision pending a determination of the issues by the sister agency and then considering and acting upon that agency's finding." 702 F.2d. at 232-233.

In addition, the record before the Forest Service, the District Court and the Court of Appeals demonstrates without contradiction that the Interior Secretary has consistently listed on the National Register mountains and other properties of a size, geography and significance identical to that which the Arizona State Historic Preservation Officer found the San Francisco Peaks to possess. The Interior Secretary has listed Inyan Kara Mountain in Wyoming's Black Hills National Forest and Bear Butte in South Dakota's Black Hills because these mountains as an entity are "central landmark[s] for Cheyenne [and Sioux] religion" and were "landmark[s] for explorers and travelers" in the area. As recently as 1981 the Interior Secretary also listed

the Helkau District of the Six Rivers National Forest because of its "past ritual use by Native Americans" even though precise geographical delineation of loci or sites of specific significance, which included numerous and diverse "trails, peaks and valleys" was not possible. 'Record, Joint Appendix, Vol. IV, pp. 1245, 1278-79, 1284.) *See* U.S. Department of Interior, National Park Service, *The National Register of Historic Places* (1976 ed.), pp. 704, 867-68.

By holding that the San Francisco Peaks are ineligible for National Register listing, Interior Department review, or the Act's protection, the Court of Appeals' decision here conflicts with the plain terms of the Act, its implementing regulations, settled Interior Department practice, and the decisions of the Ninth Circuit Court of Appeals discussed above. (App. "A", pp. 40-41.) This conflict will result in substantial confusion respecting the meaning, administration and enforcement of the National Historic Preservation Act and will make compliance with it difficult and uncertain. Given this and Congress's declared policy to preserve and protect historically significant properties managed by the federal government in a spirit of stewardship for future generations, 16 U.S.C. §470, §470-1, §470f, we submit that certiorari should be granted to review this important issue.

CONCLUSION

Based upon the foregoing, we submit that this Petition for Writ of Certiorari to the Court below should be granted.

Respectfully submitted,

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[Appendix Separately Printed and Filed]